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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

No.

W. E. HEDGER TRANSPORTATION CORPORATION,
Petitioner,
against
IRA S. BUSHEY & SONS, INC.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

PETITION.

TO THE HONORABLE THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

W. E. Hedger Transportation Corporation prays that a writ of *certiorari* issue to review the judgment and decree of the United States Circuit Court of Appeals for the Second Circuit (R. 56) entered in the above case on April 30, 1946, partly affirming and partly reversing the judgment of the District Court of the United States for the Eastern District of New York (R. 45).

The Circuit Court of Appeals entertained a motion for rehearing and filed its opinion and order denying the motion May 23, 1946 (R. 67).

STATEMENT.

The action was instituted by a Bill in Equity to vacate and set aside a decree of foreclosure of a marine preferred mortgage upon certain barges belonging to the petitioner, entered on the Admiralty side on March 8, 1945. The claimant in the foreclosure action (the petitioner here) had interposed a plea of *non indebitatus* to the libel and demanded an accounting of transactions between the parties and privies covering a period of about twelve years and involving over $1,000,000.

The libellant (respondent here) had on February 10, 1945 caused the U. S. Marshal to seize the claimant's fleet of 31 barges (R. 12) of a value of well over $250,000 while they were in active use in the prosecution of the national war effort (R. 14, 19, 20) to enforce its alleged maritime mortgage lien for $73,766.66 (R. 13).

Efforts of the claimant to secure the release of the barges upon filing security were obstructed by the libellant who sought thereby to force the withdrawal of an action for an accounting previously brought by the petitioner and another against the respondent and others in the New York State Supreme Court in which $600,000 damages were demanded (R. 4, 16).

When the District Judge ordered the foreclosure trial to proceed without passing upon the claimant's motion to obtain the release of its barges from seizure upon filing security, the claimant was faced with financial ruin because of the prolonged trial that was indisputably involved, including the necessary accounting,

during which its business would have continued to be paralyzed and ultimately ruined.

Accordingly, the claimant, believing it had no other means of immediate relief from such duress and oppression (R. 21, 23) consented to the entry of a decree against it for $69,491.56 on March 8, 1945, and paid the judgment immediately, the same day, to obtain the release of its barges.

Duress is fraud (*Hodge* v. *Wallace,* 129 Wisc. 84, 92-3) which constituted a valid ground for vacating the decree (*United States* v. *Throckmorton,* 98 U. S. 61, 65).

This action in Equity was commenced on April 4, 1945, in the U. S. District Court for the Eastern District of New York to obtain the following relief (R. 25, 26):

1. That the consent admiralty decree be vacated.

2. An accounting between the parties and privies from July 30, 1932, to the commencement of the action. (Not within admiralty jurisdiction.)

3. Discovery of the respondent's records. (Not within admiralty jurisdiction.)

4. Cancellation or reformation of various instruments passing between the parties during the accounting period. (Not within admiralty jurisdiction.)

5. An injunction restraining the respondent from divesting itself of possession of the sum of $69,488.06 (the judgment less certain notary fees) pending final determination. (Not within admiralty jurisdiction.)

6. Damages of $109,288.06 with interest (including detention damages of $30,000 for the period the barges were under seizure).

7. Other, further and different relief.

Upon motion (R. 32) the District Court held that it was without jurisdiction of the subject matter in Equity (R. 37, 44) and dismissed the complaint with leave to file a libel of review in admiralty.

The petitioners appealed to the Circuit Court of Appeals for the Second Circuit which reversed in part with an opinion (R. 48-55) holding that the complaint should be treated as a petition in the foreclosure suit in admiralty; and affirmed the dismissal as to the recovery of the $30,000 detention damage, thus misapplying *Hurn* v. *Oursler,* 289 U. S. 238. It also affirmed the dismissal as to the individual plaintiff.

Upon petition for rehearing (R. 58-64) the Circuit Court of Appeals declined—in an opinion (R. 65-66)—to modify its decision with respect to *Hurn* v. *Oursler, supra,* and denied the motion.

SPECIFICATION OF ERRORS.

Both Courts below erred:

1. In failing to hold that a Federal Court sitting in equity has power to vacate for fraud a decree in admiralty entered in the same Federal Court when non-admiralty relief is also sought in the Bill.

2. In confining the petitioner to the limited remedies lying within the power of an admiralty Court.

The Circuit Court of Appeals erred:

3. In holding that the relief demanded in the Bill (R. 25, 26) can be obtained in admiralty in this proceeding.

4. In dismissing the claim for demurrage during custody of the vessels under seizure.

QUESTIONS INVOLVED.

1. Whether the general rule that where equity jurisdiction has been properly invoked, the Court will dispose of all questions involved, whether equitable or not, and will do complete justice (*Harr* v. *Pioneer Mechanical Corp.* [CCA 2] 65 F. [2d] 332, 335; 30 *Corpus Juris Secundum,* 414, § 67), includes incidental matters in controversy over which an admiralty Court might have jurisdiction.

2. Whether the accounting demanded in the Bill is not now extrinsic to the admiralty foreclosure action since the admiralty jurisdiction over the foreclosure was purely statutory and was spent as soon as its statutory object had been attained, viz.: the collection of the alleged debt secured by the statutory lien of the preferred mortgage. Prior to the statute, jurisdiction of all foreclosures of ship mortgages lay in equity. (*Detroit Trust Co.* v. *Thomas Barlum,* 293 U. S. 21.)

REASONS FOR GRANTING THE WRIT.

1. The question whether a federal Court of Equity possesses the power to vacate a decree in Admiralty under any circumstances is an important question of federal law which has not been, but should be, settled by this Court. It is well settled that a Court of Equity may vacate a judgment entered on the Law side because of the lack of a remedy at law. The same consideration should apply to a decree in Admiralty to a like extent as of right. *Consideration* of a libel of review by an Admiralty Court is *discretionary* under the cases.

2. The application of the case of *Hurn* v. *Oursler,* 289 U. S. 238, by the Circuit Court of Appeals estab-

lishes a procedural precedent at variance with the policy of this Court as established in that case.

3. The question whether the statutory admiralty jurisdiction conferred by the Ship Mortgage Act expires upon execution of the decree in the foreclosure proceeding is an important question of federal law which has not been, but should be, settled by this Court.

4. The holding that

> "all the relief which the district court had jurisdiction to grant in any form will be open in the foreclosure suit, if the decree is vacated" **(R. 50)**;

is in conflict with the established law governing admiralty jurisdiction (*The Ada,* [CCA 2], 250 Fed. 194, 198) and, if permitted to stand, would create serious confusion as to the extent of admiralty jurisdiction.

WHEREFORE, it is respectfully submitted that this petition for a writ of *certiorari* to review the judgment of the United States Circuit Court of Appeals for the Second Circuit should be granted.

W. E. HEDGER TRANSPORTATION CORPORATION

HORACE M. GRAY,
Advocate for Petitioner.

I hereby certify that I have examined the foregoing petition, that in my opinion it is well founded and entitled to the favorable consideration of this Court and that it is not filed for the purpose of delay.

HORACE M. GRAY,
Advocate for Petitioner.

BRIEF IN SUPPORT OF PETITION.

I.
OPINIONS BELOW.

The opinion filed in the District Court appears at pages 34-37 of the Record and is not reported. The opinion filed in the District Court on petitioner's motion for re-argument appears at pages 43-44 of the Record and is not reported. The opinion of the Circuit Court of Appeals is reported at 155 F. (2d) 321 and appears at pages 48-55 of the Record. The opinion of the Circuit Court of Appeals upon the motion for re-argument is reported at 155 F. (2d) 325 and appears at pages 65-66 of the Record.

II.
JURISDICTION.

The decree of the Circuit Court of Appeals was entered April 30, 1946 (R. 56). Petition for re-argument was entertained and denied May 23, 1946 (R. 67). Jurisdiction of this Court is invoked under § 240 (a) of the Judicial Code as amended by the Act of February 13, 1945 (43 Stat. 936, ch. 229; [28 U. S. C. § 347 (a)]).

III.
SPECIFICATION OF ERRORS TO BE URGED.

All of the errors set forth in the Specification of Errors (Petition, p. 4) will be urged.

THE STATUTE INVOLVED.

The statute involved is § 30, subsection K of the Ship Mortgage Act of June 5, 1920, ch. 250; 41 Stat. 1003; 46 U. S. C. § 951; the pertinent portion of which is as follows:

> "A preferred mortgage shall constitute a lien upon the mortgaged vessel in the amount of the outstanding mortgage indebtedness secured by such vessel. Upon the default of any term or condition of the mortgage, such lien may be enforced by the mortgagee by suit in rem in admiralty. Original jurisdiction of all such suits is granted to the district courts of the United States exclusively."

FACTS.

The facts are stated in the Petition (*ante*, pp. 2-4) to which reference is made.

ARGUMENT.

I.

EQUITY SHOULD HAVE JURISDICTION OF THIS ACTION.

When a judgment of a Federal court has been attacked for fraud, the redress sought has been by a bill in equity in the Federal Court.

> *Carey* v. *Houston & Texas Central Ry. Co.*, 161 U. S. 115, 130;
> *Pacific Railroad of Mo.* v. *Mo. Pacific Ry. Co.*, 111 U. S. 505, 522;
> *Freeman* v. *Howe*, 24 How. (65 U. S.), 450, 460;
> *Krippendorf* v. *Hyde*, 110 U. S. 276, 284-5;
> *Phillips* v. *Negley*, 117 U. S. 665, 678.

In the cases above cited the judgments attacked were entered in actions at law (*Freeman* case and *Krippendorf* case) or in equity (*Carey* case and *Pacific R. R.* case). The two latter involved mortgage foreclosures—not ship mortgages.

The Federal Court has jurisdiction because the judgment under attack was entered in the Federal

Court. No other Court can disturb the judgment. Diversity of citizenship is not required.

As far as *jurisdiction* is concerned the action to vacate is ancillary to the suit in which the judgment was entered. (See *Carey* case, *supra,* at p. 130 and the *Pacific R. R. of Mo.* case, *supra,* at p. 522.)

The Circuit Court of Appeals mistakenly construed these cases to mean that the attacking action *must be ancillary* to the action in which the judgment under attack was entered. It stated (R. 54):

> "Indeed, more answer to the argument seems hardly necessary than to remember that, in order to lie at all, such a bill in equity must be 'ancillary' to the foreclosure suit."

We dispute the view of the Circuit Court that to lie, the attacking suit *must* be ancillary to the suit under attack. On the contrary, the attacking equity suit is independent and lies as of right. It is looked upon as "ancillary" *merely for the purpose of confirming jurisdiction in the Court* because it is *its* decree that is attacked.

None of the judgments in the cases above cited were entered by an Admiralty Court. And the question whether a court of Equity has the power to vacate for fraud a decree of a court of Admiralty seems to be one of first impression. A court of Equity has entertained actions to vacate for fraud judgments at law and in equity (see cases cited, *supra*). But there seems to be a "blind spot" in the reports as far as admiralty decrees are concerned. That "blind spot" should be eliminated now, once and for all. There is no reason why a fraudulent admiralty decree should be immune from scrutiny in a Court of Equity.

In the case at bar a general accounting must first be had to ascertain whether the petitioner owed the

respondent the money collected under the admiralty decree (R. 51). If it should transpire upon the accounting that the amount was owing in fact, the admiralty decree would not become involved. Then the equity accounting certainly would not be "ancillary" to the admiralty foreclosure action because the latter would not be disturbed or affected by it.

Thus a proceeding upon equitable principles must be carried to a conclusion before it can be known whether part of the relief sought—the vacating of the Admiralty decree—should be granted. To open the Admiralty decree first just to have an equitable accounting in an Admiralty court seems to be putting the cart before the horse.

II.

ADMIRALTY CANNOT GIVE THE RELIEF REQUIRED.

The complaint requests the following equitable relief: (1) a general accounting; and in aid thereof (2) discovery; and, thereupon (3) the reformation or cancellation of the preferred mortgages which were the subject of the admiralty foreclosure; and (4) injunctive relief against disposal of funds.

These items of relief are all wholly beyond the pale of admiralty jurisdiction which is limited strictly to maritime subjects.

> *Grant* v. *Poillon* (1849), 20 How. (61 U. S.) 162, 168-9;
> *The Ada* (CCA 2), 250 Fed. 194, 198.

Furthermore, an attempt to gain relief in admiralty through a libel of review might result in a complete loss of all remedy.

Whether an admiralty Court will even *entertain* a libel of review rests within the discretion of the Court.

The New England (1839), 18 Fed. Cas. 10,151;
Janvrin v. *Smith* (1842), 13 Fed. Cas. 7,220;
Snow v. *Edwards* (1873), 22 Fed. Cas. 13,145;
The Astorian (1932) (CCA 9), 57 F. (2d) 85.

Since the dismissal of a libel of review *without a hearing* rests within the discretion of the Court, and since it might be exercised because of the inability of admiralty to grant all the relief sought, a dismissal would be extremely difficult to reverse on appeal.

On the other hand when an aggrieved party states a good cause of action in a Bill in Equity he has a right to a trial without reference to any discretionary power of the Court.

Again, when the jurisdiction of a Court of Equity is properly invoked it may proceed to do complete justice between the parties notwithstanding the disposition of incidental matters of law or admiralty may be involved.

The Pennsylvania, 154 Fed. 9, 12-13;
Harr v. *Pioneer Mechanical Corp.* (1933), 65 F. (2d) 332, 335;
30 *Corpus Juris Secundum,* 414, 693-4.

In contrast to the strict limitations confining admiralty jurisdiction to narrow bounds, equity jurisdiction is flexible and expansive.

Union Pac. Ry. Co. v. *Chicago, etc., Ry. Co.,* 163 U. S. 564, 600-1.

There is also a grave question whether the admiralty jurisdiction conferred by the Ship Mortgage Act (*ante*, p. 8) had not expired with the execution of the judgment of foreclosure.

The statute grants jurisdiction to enforce the statutory mortgage *lien* by suit *in rem*. Where the alleged mortgage debt has been paid the lien vanishes and there is nothing left to support admiralty jurisdiction. The purpose of the Act was to make vessels available for credit (*The Owego*, 292 Fed. 403, 405). The purpose of the Act having been accomplished by collection, the parties have no further need for admiralty jurisdiction and must fall back into equity where foreclosures always had lain before the statute (*Detroit Trust Co.* v. *The Thomas Barlum*, 293 U. S. 21).

III.

THE DOCTRINE OF HURN v. OURSLER IS APPLICABLE.

In its opinion the Circuit Court of Appeals stated (R. 53) with respect to the claim for detention damage through the seizure of the petitioner's barges:

> "Since the district court has no independent jurisdiction over that controversy, the plaintiffs must be relegated to the state court for relief; for this cause of action is not within *Hurn* v. *Oursler*, 289 U. S. 238, assuming that that doctrine applies to a suit in admiralty, which we do not decide."

The seizure of these barges by the marshal under admiralty process on navigable waters constituted a maritime tort if the process was abused. Hence under the allegations of the Bill the claim was cognizable in

admiralty and the Federal court *has independent jurisdiction thereof.*

The Admiral Peoples, 295 U. S. 649, 651;
The Apollon, 9 Wheat. (22 U. S.) 362, 377-8.

The *effect* of the alleged maritime tort upon the petitioner relates to the charge of duress, but the *money recovery* for the tort is within the original admiralty jurisdiction of the District Court.

Therefore the dismissal of this claim was erroneous. (see R. 66) *Hurn* v. *Oursler,* 289 U. S. 238, 246.

It is respectfully submitted that the petition should be granted.

HORACE M. GRAY,
Advocate for Petitioner.

August, 1946.

IN THE

Supreme Court of the United States

OCTOBER TERM—1946

No. 423

W. E. HEDGER TRANSPORTATION CORPORATION,
Petitioner,

against

IRA S. BUSHEY & SONS, INC.,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

CHRISTOPHER E. HECKMAN,
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Respondent respectfully submits that the petition for writ of certiorari should be denied.

The judgment of the District Court finally disposed of the action because it dismissed petitioner's complaint (R. 50). But the reversal of the judgment (R. 55) leaves considerable doubt whether it is now final.

The Circuit Court of Appeals directed that petitioner's complaint be treated as a petition to vacate a decree in a previous mortgage foreclosure action between the parties (R. 55). It dismissed only a small part comprising petitioner's demand to recover damages on a cause of action for abuse of process, there being no diversity of citizenship and such cause of action being entirely separate and distinct from that which formed the basis of jurisdiction, viz.: the application to vacate the Admiralty decree in the mortgage foreclosure proceeding.

This Court has before it only the allegations of the complaint. There is no final judgment on the merits.

The petition fails to show any conflict between the decisions of the different Circuits or of this Court. There is no important question of Federal or local law involved. By holding that an application to vacate a judgment must be considered an integral part of the proceeding in which the judgment was rendered, the decision has followed the usual course of judicial proceeding. No substantial questions of importance are shown to be involved.

Petitioner's recitation of the facts alleged (but not yet proven) is so incomplete that respondent deems a more lengthy one necessary in the interests of clarity.

Facts

On February 10th, 1945, respondent instituted an action in Admiralty in the United States District Court, Eastern District of New York, under Title 46, U. S. C. A. Section 951, *in rem* against 35 wooden barges and *in personam* against petitioner for the foreclosure of a United States preferred maritime mortgage on the vessels.

Under process duly issued, the vessels were seized by the Marshal. Petitioner filed an answer pleading payment as well as lack of adequate consideration for the mortgage, and demanding an accounting of the monies paid to respondent (Complaint, 32nd Allegation, R. 13). The Court ordered a prompt trial, which was begun on March 7th, 1945 (44th Allegation, R. 17).

Despite the opportunity then open to obtain a prompt decision on the merits of its asserted defense of payment, petitioner in open court, after the trial had begun, formally tendered to respondent the amount demanded and consented to the entry of a final decree in favor of respondent in the mortgage foreclosure proceeding (Complaint 22-23). On March 8th, 1944 petitioner obtained

satisfactions of the decree and of the preferred mortgage in exchange for its payment to respondent (R. 23). Thus respondent's lien on the vessels was discharged.

On April 4th, 1945, twenty-seven (27) days after the entry of the decree and delivery of mortgage satisfactions petitioner instituted this action in Equity in the United States District Court, Eastern District of New York (joining its president as an individual party plaintiff). This was before expiration of the term of Court in which the final decree had been entered and long before the expiration of the time for appeal therefrom.

Petitioner demanded (a) that the consent decree be vacated; (b) an accounting; (c) discovery of respondent's books and records; (d) cancellation or reformation of the mortgage instrument; (e) an injunction restraining respondent from disposing of the sum paid in satisfaction of the consent final decree and mortgage; (f) damages in the sum of $109,288.06 (R. 25-26).

The damages demanded comprised the amount paid in satisfaction of the decree and mortgage (64th allegation, R. 23), $30,000 damaged suffered as a result of the retention of the vessels under process which was alleged to constitute an abuse of process (R. 24) and $9,800 paid by petitioner to respondent on account of the mortgage indebtedness previous to the institution of the foreclosure suit, allegedly under a mutual mistake of fact as to the amount due (R. 24-25).

Petitioner and respondent are New York corporations (R. 3); the individual plaintiff a resident of New Jersey (R. 3).

Respondent moved before answer for judgment dismissing the complaint on the grounds of non-jurisdiction of the Equity side of the Federal Court over the subject matter and failure to state a claim on which relief could be granted (Notice R. 32).

Under *City of Indianapolis* v. *Chase National Bank*, 314 U. S. 63, 69; 62 S. Ct. 15, 17; 86 L. Ed. 48, jurisdiction could not have been sustained on the ground of diversity of citizenship and petitioner did not so urge. The District Court dismissed for lack of jurisdiction of the Equity side of the Court without prejudice to petitioner's right to file in Admiralty a libel for review of the mortgage foreclosure proceedings on the ground alleged in the complaint (Opinion, R. 36-37). On appeal petitioner argued that the Equity side has jurisdiction to set aside a decree entered in a United States Court even though in Admiralty without any other jurisdictional requirement and argued that the Admiralty side of the Court was without jurisdiction to grant the relief sought by the complaint.

The Circuit Court of Appeals, pointing out that matters of form should be disregarded to reach the substance, held that instead of dismissing the complaint the District Court should have treated it as a libel of review or a petition in the foreclosure suit to vacate the decree (R. 55 and 51); that under such petition the Admiralty Court if pursuaded that the decree should be vacated has jurisdiction to grant all the relief plaintiff requested except its demand for damages for the abuse of process averred in the 67th allegation (R. 51-53). The Court pointed out that recovery for abuse of process would be a separate cause of action not connected with the subject matter of the foreclosure suit as to which plaintiff must proceed in the State Court because it would not constitute a maritime tort within the Admiralty jurisdiction and diversity of citizenship was lacking (R. 53). Thereafter, petitioner applied for reargument contending that the abuse of process cause of action should not have been dismissed inasmuch as there was Admiralty jurisdiction because the alleged wrongful attachment of the vessels under the abuse of process occurred on maritime waters, thus constituting a maritime tort (R. 59). Denying this petition the Circuit Court pointed out that such contention had not been raised on the argument,

but that petitioner would be granted leave to file on independent libel in the District Court for the alleged maritime tort, leaving the District Court free to decide the jurisdictional question and if satisfied as to it "free to exercise its discretion to hear the evidence in that suit at the same time as the evidence in the foreclosure suit (R. 65-66).

Under these rulings petitioner has an opportunity to have a single trial in one Court of all the issues of its complaint and if it satisfies the Court that the Admiralty foreclosure decree was wrongfully obtained to produce evidence supporting its demand for an accounting.

It appears that if petitioner had proceeded in the manner suggested in the Circuit Court's decisions, the last of which was rendered May 23rd, 1946, petitioner by this time might well have obtained a final decision on all issues tendered. Certainly it would be well on the way toward termination of the litigation.

POINT I

The decision is correct.

When Congress gave the Admiralty Court exclusive jurisdiction of *in rem* proceedings to foreclose a preferred maritime mortgage (46 U. S. C. A. 951) it certainly did not intend that after appropriate proceedings in such Court a mortgagee should be subjected to another trial of the same issue in a different Court in an action for review of the Admiralty proceedings. Of course, the Admiralty Court which granted the decree has jurisdiction to review its own proceedings and to open its own decree, but if petitioner be entitled to proceed in Equity in the Eastern District of New York as it seeks to do here, it may proceed on the Equity side of a District Court of some other State, provided only venue jurisdiction can be had there.

Such step would be contrary to the well settled rule of *Carey* v. *Houston & Texas Central RR. Co.*, 161 U. S. 115, at 130, that an action for the review or correction of a decree or judgment is a "continuation of the main suit."

In *Carey* v. *Houston, supra,* this Court said (132):

> "We regard it as not open to argument that the jurisdiction of the circuit court, as a court of the United States, over this suit, rested on the jurisdiction of that court over the suit in which the decree of May 4th, 1888, was rendered * * *."

The Equity side of the United States District Court for the Eastern District of New York had no jurisdiction over the suit in which the decree of March 8th, 1945, was rendered, because that was a decree in an *in rem* proceeding in Admiralty to foreclose a preferred mortgage. Therefore, it has no jurisdiction over this suit to vacate that decree.

Petitioner suggests that the Admiralty Court's jurisdiction ended when the decree of foreclosure was entered and satisfied. This contravenes the basic principle that within certain time limitations not here involved a Court has general power to vacate, change or modify its own decree improperly obtained.

If we assume petitioner's success in proving its assertion that this decree was obtained by improper means (which imputes misconduct to three District Judges) (Cf. 37th, 39th, 43rd and 44th allegations, R. 15 and 17) the foreclosure decree should be vacated, but there would still remain for trial and disposition the original suit *in rem* to foreclose the mortgage. If petitioner offered enough evidence to warrant an accounting there can be no doubt about the Court's power to require one when necessary to render final judgment in an action over which jurisdiction was expressly conferred by statute.

As the Circuit Court of Appeals stated in its opinion (R. 52):

> "Clearly a Court of Admiralty at times must state accounts as an incident to the disposition of suits within its cognizance; general average is one instance, salvage is another. In the case at bar the foreclosure suit was brought under Section 951 of Title 46 U. S. C. and it would be impossible to enforce the statute, if the suit must be halted every time a question of accounting arose as to the amount due upon the mortgage."

Petitioner states the case as though its resort to Equity to vacate an Admiralty decree of foreclosure in an *in rem* proceeding involving a preferred maritime mortgage was proper and as though its case involved only incidental Admiralty matters. It also says (in its brief, pp. 9 and 10) that an accounting must first be had to ascertain whether petitioner owed respondent any money and that to open the Admiralty decree first "just to have an equitable accounting in an Admiralty Court seems to be putting the cart before the horse." It is petitioner who confuses the cart's location. Until petitioner succeeds in proving that the decree in the Admiralty proceeding was improperly obtained, it stands as an adjudication that there was a balance in favor of respondent. The existence of such decree, the attempt to vacate it and the necessity for vacating it are the very grounds which petitioner must urge as the base of jurisdiction in this action between two corporations of the same state. Certainly a Federal Court has no jurisdiction in a suit for a simple accounting between two citizens of the same State.

POINT II

The dismissal of the cause of action for abuse of process was proper.

In *Hurn* v. *Oursler,* 289 U. S. 238, the Court clearly stated that if one cause of action be separate and distinct from another in the sense that it is based upon entirely different facts and is outside the Federal jurisdiction, it must be dismissed even though the other cause be within the jurisdiction. Petitioner does not contend that the causes of action are the same.

That petitioner's claim for damage for abuse of process may be cognizable in Admiralty (which we do not concede) where jurisdiction depends on the maritime character of the transaction does not mean it is cognizable on the Law or Equity side where diversity or a Federal question is a prerequisite to jurisdiction.

CONCLUSION

The petition should be denied.

Respectfully submitted,

CHRISTOPHER E. HECKMAN,
Counsel for Respondent.